Office - Supreme Court, U.S.
FILED
SEP 20 1982
ALEXANDER L. STEVAS
CLERK

NO. 82-496

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondents.

# PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT H. STEVENSON
and
DAVID W. HARRIS

Counsel for Petitioner

Office and Post Office Address:
1104 Dexter Horton Building
Seattle, Washington 98104
Telephone: (206) 682-3624

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

---

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

---

ROBERT H. STEVENSON
and
DAVID W. HARRIS

Counsel for Petitioner

Office and Post Office Address:
1104 Dexter Horton Building
Seattle, Washington 98104
Telephone: (206) 682-3624

## QUESTIONS PRESENTED

(1) Is a state a "person" under Section 1983 of the Federal Civil Rights Act, and, if so, entitled to continue to immunize itself under the Eleventh Amendment from a civil damage action by a private citizen?

(2) Should the scope of the Federal Civil Rights Act now be broadened to states and their agencies under the "equitable loss spreading" doctrine of Owen v. City of Independence, Missouri, 445 U.S. 622, (1980)?

(3) May a state restrict the rights afforded under Section 1983 of the Federal Civil Rights Act by construing those rights as mere legal theory?

## TABLE OF CONTENTS

Opinion Below ..... 2

Jurisdiction ..... 3

Statute Involved ..... 3

Statement of the Case ..... 4

Reasons for Granting the Writ ..... 7

Conclusion ..... 26

Appendices:

Appendix 1 ..... 28

Appendix 2 ..... 33

Appendix 3 ..... 35

Appendix 4 ..... 36

## TABLES OF AUTHORITY

Alabama v. Pugh
430 U.S. 781 (1978) ..... 19

Cox Broadcasting Corp. v. Cohn
420 U.S. 469 (Ga. 1975) ..... 9

Edelman v. Jordan
415 U.S. 651 (1974) ..... 13

Edgar v. State of Washington
92 W2d 217 ..... 2

Equitable Life Assurance Society v.
Brown, 187 U.S. 308..... 8

Fitzpatrick v. Bitzer
427 U.S. 445 (1976) ..... 17

Hutto v. Finney
437 U.S. 678 (1978) ..... 17

Owen v. City of Independence, Missouri
445 U.S. 622 (1980) ..... 2

Quern v. Jordan
440 U.S. 332 (1979) ..... 7

Monell v. Dept. of Social and Health Services of the City of New York,
436 U.S. 658 (1978) ..... 2

Monroe v. Pape
365 U.S. 165 (1961) ..... 12

Rodgers v. Alabama
192 U.S. 226 ..... 8

Slaughter House Cases
83 U.S. (16 Wall)36 ..... 12

## CONSTITUTIONAL PROVISIONS

United States Constitution:
Eleventh Amendment ..... 10, 13
Fourteenth Amendment ..... 4, 10

## STATUTES

Federal Civil Rights Act
42 U.S.C. 1981 ..... 11
42 U.S.C. 1982 ..... 11
42 U.S.C. 1983 ..... 3
42 U.S.C. 1985 ..... 11

18 U.S.C. 241 ..... 11
18 U.S.C. 242 ..... 11

28 U.S.C. 1257(3) ..... 3

28 U.S.C. 1331(a) ..... 3

R.C.W. 26.44.070 ..... 5

Rule 54(b) ..... 8

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

CLYDE C. COFFEY,

Petitioner,

vs.

STATE OF WASHINGTON, Department of Social and Health Services, State of Washington,

Respondents.

---

PETITION FOR A WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

---

The petitioner respectfully prays that a Writ of Certiorari issue to review the refusal of the Supreme Court of the State of Washington to review the appellant's claim for damages for violation of his Fourteenth Amendment rights against the state under the Federal Civil Rights Act.

(42 U.S.C. §1983).

## OPINION BELOW

In December of 1980, the trial court refused to permit appellant to include a claim for damages against the state under the Federal Civil Rights Act. It granted the state's motion to dismiss the claim under the authority of Edgar v. State of Washington, 92 $W^{2d}$ 217, but certified the question to the Washington State Supreme Court for review as one involving a fundamental and urgent issue requiring prompt determination because of this Court's decisions in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980) and Monell v. Dept. of Social and Health Services of the City of New York, 436 U.S. 658 (1978). (Appendix 1). The State Supreme Court referred the appeal back to the Washington State Court of Appeals on July 22, 1981. The commissioner of the Court of Appeals

dismissed the appeal on the ground that it was not a final judgment but alleged only a legal theory. (Appendix 2). That ruling was later upheld by the State Supreme Court by its minute entry of June 30, 1982. (Appendix 3). A mandate of the Court of Appeals dated July 14, 1982 remanded the matter back to the trial court. (Appendix 4). This petition followed.

## JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) and 28 U.S.C. 1331(a).

## STATUTE INVOLVED

The Federal Civil Rights Act of 1871, section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States ....to the deprivation of

any rights.....shall be
liable to the party injured
in an action at law....."

## STATEMENT OF THE CASE

The heart of the appellant's case below is a complaint that the state's agency (DSHS) violated his Fourteenth Amendment rights under the Federal Civil Rights Act and caused him damage. The state contends that it is not liable for the acts of its agencies, committed in performance of their governmental functions.

Appellant, the natural father of his 13-year old daughter, commenced an action for damages against the State of Washington and the Department of Social and Health Services of the state, for severe emotional distress suffered because of the department's alleged misconduct.

It was alleged that the state had unlawfully interfered with his parental relationship and violated his Fourteenth Amend-

ment rights by denying him a hearing upon a child abuse report concerning the spanking of his daughter and seizing her without a hearing. The filing of a child abuse report in a central stage registry is required under a state statute (R.C.W. 26.44.070) when any "report" is made.

Appellant's daughter (Cindy) had been attending a religious school in February of 1979. She had been getting poor grades because of reading difficulties (later diagnosed as dyslexia), but had had no disciplinary problems either at home or at school.

When Cindy and her stepmother had a family argument over the failure of Cindy to do certain household chores, the stepmother spanked her with a wooden spoon. Angered, Cindy called the police, who took her to the Youth Service Center.

The assigned caseworker refused to permit the appellant to take his daughter

home and insisted that he agree to place her in a girl's school for incorrigible and problem children. The alternative threatened was a permanent foster home and never seeing his daughter again. The appellant and his wife were advised that they had no other options, were not entitled to a hearing, and had no legal rights in the matter. Cindy wanted to go home, but was in turn threatened with permanent placement in a foster home by the state.

As the result of such coercion, threats, and intimidation, appellant agreed to the "school". When Cindy entered she found she could not receive mail, was not permitted visitation, could not call home, and could not leave the grounds. She ran away four days after she arrived and remained hidden from her family and the authorities for two weeks. Searches by her parents and the police failed to disclose her whereabouts.

At the end of the two week period, Cindy called her parents and asked to be taken home. The state promptly dropped the case and Cindy remained home with her parents.

At the trial, appellant's efforts to allege and prove that the Department of Social and Health Services (DSHS) had engaged in conduct which deprived him of rights, privileges and immunities secured by the Federal Constitution, was prohibited. This refusal was bottomed on Edgar v. State, 92 W$^{2d}$ 917, which denied a National Guard officer the right to sue the state for damages and deprivation of his civil rights under §1983 of the Federal Civil Rights Act. Edgar relied on this Court's decision in Quern v. Jordan, 440 U.S. 332 (1979).

## REASONS FOR GRANTING THE WRIT

A substantial federal question was raised in the state court, which has not

been explicitly foreclosed by prior decisions of this Court so as to leave no room for controversy. Equitable Life Assurance Society v. Brown, 187 U.S. 308. Prior authority of this Court, permitting a state to immunize itself from civil suits for damages by private citizens, harmed by state action, under section 1983 of the Federal Civil Rights Act, should now be overruled under Owen, which broadened its scope to include cities.

Appellant followed state procedures in raising the federal question. The trial court certified it to the State Supreme Court, which avoided the question by a procedural device, i.e., characterizing a section 1983 cause of action as legal theory rather than a claim. (Appendix 2); Rule 54(b) of Rules for Superior Court of the State of Washington. When this occurs, this court can nevertheless assert its jurisdiction. Rodgers v. Alabama, 192 U.S. 226

(attempt by state court to avoid federal question by application of local court rule). The denial of prompt review of this question also visits great hardship, delay, and expense upon appellant.

Likewise, the question presented is a controlling question of law on which there is a substantial difference of opinion. This appeal will materially advance the ultimate termination of the litigation. When the Washington State Supreme Court refused to review the federal question presented, that issue was "final" for purposes of review by this court, notwithstanding there are further proceedings of an entire trial. The federal issue is "conclusive". Cox Broadcasting Corp. v. Cohn, (Ga. 1975) 420 U.S. 469.

Edgar was decided by the Washington State Supreme Court prior to this Court's decision in Owen v. City of Independence, Missouri, 445 U.S. 622 (1980). In light

of the "equitable loss spreading" principle enunciated by this Court in Owen, the entire question of state immunity under the Eleventh Amendment should be reconsidered. State immunity has been addressed by this Court in a checkered and confusing manner over the years.

The Civil Rights Acts grew out of federal civil rights legislation in the form of the Civil Rights Act of 1866 following the Civil War. The Fourteenth Amendment was also ratified by the states during this same period and articulated the principles of the Act of 1866. Section 1983 of the Act was enacted pursuant to Section 5 of the Fourteenth Amendment to fully enforce the constitutional form of the Act, or Section 1 of the Amendment. Section 1 is clearly directed at the states themselves. Therefore, Section 1983 was designed to enforce the Fourteen Amendment and to remedy the unconstitutional indis-

cretions of the states.

The Civil Rights Act of 1866 was reenacted along with other civil rights legislation in 1870 and in April of 1871 Sections 1983 and 1985(3) were passed, now codified as 42 U.S.C. §1983, 1985(3). The main civil rights statutes of the Reconstruction legislation are now codified in 42 U.S.C. §1981 (Equal Rights Under the Law), §1982 (Property Rights of Citizens), §1983 (Civil Action for Deprivation of Rights), §1985(3) (Depriving Persons of Rights and Privileges), 18 U.S.C. §241 (Conspiracy Against the Rights of Citizens), and §242 (Deprivation of Rights Under Color of Law).

The Civil Rights Act of 1871, section 1873, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any

> citizen of the United States ....to the deprivation of any rights....secured by the Constitution....shall be liable to the party injured in an action at law....."

In order to assess this court's reliance in Edgar on Quern, some analysis of the scope and history of the interpretation of Section 1983 must be made.

The Slaughter House Cases, 83 U.S. (16 Wall) 36, ignored congressional intent in enacting the Civil Rights Acts and interpreted the Fourteenth Amendment restrictively as protecting only rights important to national citizenship such as the right to transact business with the federal government and use of federal seaports.

In Monroe v. Pape, 365 U.S. 165 (1961) the court refused to permit citizens to sue cities under Section 1983 for damages arising out of alleged violations of the constitutional rights. Cities, at that time, were not "persons" within the meaning of the

Act.

Edelman v. Jordan, 415 U.S. 651 (1974) followed a decade later. It expanded the doctrine of Monroe by setting up yet a second barrier to State liability under Section 1983 - the Eleventh Amendment to the United States Constitution. The court found that citizens were not entitled to declaratory and injuctive relief against the State of Illinois for violation of their Fourteenth Amendment rights in the administration of programs for the blind, aged and disabled. It judicially enlarged the language and coverage of the Eleventh Amendment by granding the State immunity from suits brought in federal court by its own citizens as well as citizens of other States. The Eleventh Amendment provides:

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state,

or by citizens or subjects of any foreign state."

The court was concerned over the payment of monies from a State treasury:

> "Thus the rule was evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the State treasury is barred by the Eleventh Amendment.... The funds to satisfy the award in this case must inevitably come from the general revenues of the State of Illinois, and thus the award resembles far more closely the monetary award against the State itself (citing cases)....than it does the prospective relief awarded in Ex parte Young."

In Monell, the court noted that Section 1983 was to be given a liberal interpretation in light of its significant legislative history. It could see no reason to suppose that municipal corporations would be excluded from its sweep. It partially reversed Monroe and analyzed thoroughly the intent of the Congress in enacting civil rights legislation. Congress, it said, never intended that cities and local

governments be immune, since Section 1983 had been specifically enacted to enforce the Fourteenth Amendment (Id. 436 U.S. at 700). The court raised serious doubts about the reasoning and validity of Edelman to the extent that the latter held that States were not "persons". It relied on the legislative history of the Act. Quoting from Representative Shellabarger:

> "Why not in advance provide against the denial of rights by the States, whether the denial be acts of omission or commission, as well as against the unlawful acts of combinations and conspiracies against the rights of the people? The States never had the right, though they had the power, to inflict wrongs upon free citizens by a denial of the full protection of the laws; because all State officials are by the Constitution required to be bound by oath or affirmation to support the Constitution. As I have said, the States did deny to citizens equal protection of the laws, they did deny the rights of citizens under the Constitution, and except as I have shown, the citizens had no remedy. They took property without

> compensation, and he had no remedy. They restricted freedom of the press and he had no remedy. They restricted freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy. Who dare say, now that the Constitution has been amended, that the nation cannot by law provide against all such abuses and denials of right as these in States and by States or combinations of persons?
>
> "This act is remedial and in aid of the preservation of human rights. All Statutes are liberally and beneficently construed. It would be most strange, and, in civilized law, monstrous, were this not the rule of interpretation."

Thus, the purpose of Section 1983, according to its legislative history, is to redress violations of "human liberty and human rights' committed by the States, State officials, or under color of State law. It was to provide innocent citizens, who were harmed by the abuse of governmental authority, with assurance that they

would be compensated.

Since Monell there have been other decisions undermining Edelman's holding on the scope of a state's liability under Section 1983. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) the court held that Congress, in adopting the Equal Employment Opportunity Act of 1972 had amended the Civil Rights Act of 1964 to include "governments, governmental agencies and political subdivisions" among employers subject to the Act's protection against discrimination in employment. Hutto v. Finney, 437 U.S. 678 (1978) followed. The court was divided in holding that the Civil Rights Attorney's Fee Award Act of 1976 was intended to override Eleventh Amendment immunity of the states and authorized attorney's fees payable by the states when officials were sued in their official capacities. It found that the Act was broad and lacked any "limit" of exempting States from its scope under the Fourteenth Amendment. It seemed

to comport with Edelman's holding that "Prospective" relief was permissible because it had only "an ancillary effect" on the State treasury. But Hutto diluted and liberalized Fitzpatrick's "clear impression" standard. In fact, Mr. Justice Brennan commented in his concurring opinion that Hutto read in light of Edelman and Monell, made it "surely an open question whether Section 1983 properly construed does not make the States liable for relief of all kinds, notwithstanding the Eleventh Amendment". 437 U.S. at 703. In other words, Fitzpatrick overruled Edelman sub silento.

The Supreme Court sought to clear the controversy in Quern, but only confused the question. The issue was whether a federal district court "may, consistent with the Eleventh Amendment, order.....State officials to send a mere explanatory notice to members of the plaintiff class advising

them that there are state administrative procedures available by which they may receive a determination of whether they are entitled to past welfare benefits". The majority attempted to soften some of the conceptual problems of Edelman, Monell and Fitzpatrick. It reaffirmed Edelman's holding that a State could not be a "person" for purposes of Section 1983, citing Alabama v. Pugh, 430 U.S. 781 (1978) as evidence of such a conclusion. In Pugh, the State of Alabama, named as a party in a suit in which the plaintiff alleged that his criminal confinement was cruel and unusual punishment, asserted it could not be enjoined, relying on Eleventh Amendment immunity. The Supreme Court held that the State could not be named as a party.

The dissent in Pugh, however, disagreed vigorously with Quern's understanding of the scope of Pugh. Justices Brennan

and Marshall stated that the court in Pugh could not have possibly meant to have resolved the issue of whether a State is a "person" within Section 1983.

The Quern court examined the events at the time of the adoption of the Fourteenth Amendment and Monell's reading of the legislative history of Section 1983. It concluded that according to the clear language test of Fitzpatrick or Hutto Congress had not intended to overturn the constitutionally guaranteed immunity of the several States.

While not, perhaps, meeting the strict standards of Fitzpatrick's "clear language" test, Section 1983 would satisfy Hutto's "totality of the circumstances" approach to the clear language test of Congressional intent to abrogate State sovereign immunity.

The first element of the clear language test is whether the legislation was enacted for the purpose of providing a

broad remedy for civil rights violations. 437 U.S. at 694. In Monell the court concluded that "there can be no doubt that Section 1 of the Civil Rights Act was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." 436 U.S. at 700. Neither does Monell's analysis of the legislative history of Section 1983 give any hint of excepting the states from its language. Section 1983's legislative history is quoted extensively in Monell to the effect that cities and other local governments are legal "persons" within the meaning of the section.

Many of the passages quoted in Monell plainly support the view that the 42nd Congress, in passing the Civil Rights Act of 1871, did intend to hold the states accountable for constitutional violations of the rights of their citizens. Representative

Edmonds interpreted Section 1983 as a protective measure for rights guaranteed by the Constitution when they "are assailed by any State or under color of any State law, and it is merely carrying out the principles of the civil rights bill (of 1866), which have since become part of the Constitution..." 436 U.S. at 684-685. Representative Garfield said that Section 1983 was intended to remedy "a systematic maladministration of State law." Senator Thurman, a critic of Section 1983, described the purpose of the legislation as authorizing any person who is deprived of any right, privilege or immunity secured to him by the Constitution, to bring an action against the wrongdoer in federal court...."There is no limitation whatever upon the terms that are employed and they are as comprehensive as can be used." 436 U.S. at 686.

The last element of Hutto's clear

language test is whether the legislation in question "primarily applies to laws passed specifically to restrain State action". 437 U.S. at 694. Section 1983 fulfills this requirement, and that it does is admitted by the Hutto court which cites Section 1983 as an example of legislation aimed at restricting State action. 473 U. S. at 694.

It is thus clear that Section 1983 meets all of the criteria required by Hutto to prove that Congress enacted it with the intent to override State sovereign immunity under the Eleventh Amendment. The Quern court unnecessarily limited the scope of Section 1983, particularly in light of its legislative history and Monell's holding.

The Impact of Owen v. City of Independence, Missouri:

The Supreme Court, against this background, decided to uphold a citizen's right to sue the government for a violation of

his civil rights by preventing a city from seeking sanctuary behind the cloak of even partial sovereign immunity. A lower court had decided that the former Chief of Police of Independence could not collect damages from the City because governments are immune from suit when they discharge their duties in "good faith", even if they unintentionally violate a citizen's rights. The Supreme Court rejected that position and greatly extended the scope of Section 1983 by applying the principal of "equitable loss spreading" among the public, the victim, and offending government official. The court said:

> "Doctrines of tort law have changed significantly over the past century, and our notions of governmental responsibility should properly reflect that evolution. No longer is individual 'blameworthiness' the acid test of liability; the principle of equitable loss spreading has joined fault as a factor in distributing the costs of official misconduct.

> "We believe that today's decision, together with prior precedents in this area, properly allocates these costs among the three principals in the scenario of the Section 1983 cause of action: the victim of the constitutional deprivation; the officer whose conduct caused the injury; and the public represented by the municipal entity. The innocent individual who is harmed by an abuse of governmental authority is assured he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business, secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by the 'execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'"

The old argument of the Edelmen court that public treasuries would be invaded and that this would cause havoc with the everyday workings of government was dispelled

by Owen. With it fell Eleventh Amentment immunity arguments, also. The same reasoning of the Monell and Owen courts applies equally to State liability. Likewise, both Monell and Owen indicate that Section 1983 was intended to allow redress for constitutional wrongs commited by States and that Congress intended no differentiation between States and municipalities.

## CONCLUSION

This Court's holding in Quern is in grave doubt, because it concerned itself with the narrow question of whether a federal district court could order state officials to send explanatory notices to certain members of petitioner's class advising them of state procedures without being barred by the Eleventh Amendment. Quern was neither argued nor briefed.

It is now time for this Court to reassess and overrule the historical claim of

immunity by a state under the Federal Civil Rights Act, in light of Owen, by abolishing all immunity and creating a more workable formula for permitting private citizens to assert claims for damages against transgressing governments of all types.

A Writ of Certiorari should issue to review this important question.

Respectfully submitted,

Robert H. Stevenson

David W. Harris

Attorneys for Appellant